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In The

Supreme Court of the United States

October Term, 1996

JEFFREY L. PEITZMEIER and
SHERRY L. PEITZMEIER,

Petitioners,

vs.

HENNESSY INDUSTRIES, INC., a New Jersey Corporation, d/b/a through its divisions COATS COMPANY and SOLAR INDUSTRIES, INC.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

TERRY M. ANDERSON
Counsel of Record
Creighton Law School
Omaha, Nebraska 68178
(402) 280-3099
HAUPTMAN, O'BRIEN,
WOLF & LATHROP, P.C.
9290 West Dodge Road
Suite 403
Omaha, Nebraska 68114
(402) 390-9000

BRUCE R. KASTER
GREEN, KASTER,
& FALVEY, P.A.
P. O. Box 2720
Ocala, Florida 34478
(904) 732-9252

LARRY C. JOHNSON
JOHNSON & VAUGHN P.C.
114 East Military
Fremont, NE 68025
(402) 721-2430

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the factors set forth in *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) for determining the admissibility of scientific knowledge under Rule 702 of the Federal Rules of Evidence apply to technical or other specialized knowledge.

2. Whether the testimony of an engineer concerning the design and operation of a tire-changing machine is "scientific" knowledge or "technical" knowledge for purposes of determining admissibility of expert testimony under the *Daubert* factors and Rule 702 of the Federal Rules of Evidence.

3. Whether such testimony was erroneously excluded under Rule 702.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

RULE INVOLVED 1

STATEMENT 2

A. Proceedings in the District Court 3

B. Proceedings in the Court of Appeals 5

REASONS FOR GRANTING THE PETITION 7

I. The *Daubert* Decision's Mixed Message 10

A. The "General Reliability" Requirement 11

B. The Application of the *Daubert* Factors 19

II. The Eighth Circuit Erred in Excluding Dr. Milner's Testimony 22

CONCLUSION 26

APPENDIX 1a

TABLE OF AUTHORITIES

Page

CASES

Berry v. City of Detroit, 25 F.2d 1342 (6th Cir. 1994), *cert. denied*, 115 S.Ct. 902 (1995).....13, 20

Bogosian v. Mercedes-Benz of North America, 1997 W.L. 3276*5 (1st Cir. 1997).....14

Byrnes v. Honda Motor Co., 887 F.Supp. 279 (S.D. Fla. 1994).....21

Carroll v. Morgan, 17 F.3d 787 (5th Cir. 1994).....14, 15

Compagnie Des Bauxites v. Ins. Corp. of M. Am., 651 F.2d 877 (3d Cir. 1981).....7

Compton v. Subaru of America, Inc., 82 F.3d 1513 (10th Cir. 1996).....*passim*

Cummings v. Lyle Indus., 93 F.3d 362 (1996).....20

Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786 (1993).....*passim*

Freeman v. Case Corp., 924 F.Supp. 1456 (W.D. Va. 1996).....21

Frye v. United States, 54 App. D.C. 46 (1923).....10, 12

Holbrook v. Lykes Bros. S.S. Co., 80 F.3d 777 (3d Cir. 1996).....15

Iacobelli Construction, Inc. v. County of Monroe , 32 F.3d 19 (2nd Cir. 1994).....15, 20

Insurance Corp. v. Compagnie Des Bauxites, 456 U.S. 694 (1982).....7

Jones v. Otis Elevator Co., 861 F.2d 655 (11th Cir. 1988).....25

TABLE OF AUTHORITIES – Continued

Page

Kudlacek v. Fiat Spa, 244 Neb. 822, 509 N.W.2d 603 (1994) 9

McCullock v. H.B. Fuller Co., 61 F.3d 1038 (2nd Cir. 1995) 20, 21, 23

Meneely v. Denman Tire Corp., No. 93-10151 (N.D. FLa., July 20, 1995) 25

Officer v. Teledyne Republic/Sprague, 870 F.Supp. 408 (D. Mass. 1994) 12, 18, 23

Pacheco v. Coats, 26 F.3d 418 (1994) 25

Thomas v. Newton Int'l Enter, 42 F.3d 1266 (9th Cir. 1994) 15, 20

Tyus v. Urban Search Management, 1996 U.S. App. 102 F.3d 256 (7th Cir. 1996) 8, 20

United States v. Johnson, 28 F.3d 1487 (8th Cir. 1994) 18

United States v. Posado, 57 F.2d 428 (5th Cir. 1995) ..13, 14

STATUTES AND RULES

28 U.S.C. §1254(1) 1

Fed. R. Evid. 104 ..... 10, 11, 17, 22

Fed. R. Evid. 702 ..... *passim*

Neb. Rev. Stat. §25-21,182 (Reissue 1989) 9

MISCELLANEOUS

Agrimonti, *The Limitation of Daubert and Its Misapplication To Quasi-Scientific Experts, a Two-Year Case Review of Daubert v. Merrill Dow Pharmaceuticals, Inc., 113 S.Ct. 2786 (1993)*, 35 Washburn L.J. 134, 135 (1995) 16

TABLE OF AUTHORITIES – Continued

Page

Nelson G. Apjohn & Suzanne M. Quill, *Post-"Daubert" Admissibility of Expert Testimony of Mechanical and Engineering Issues*, 23 Product Safety and Liability Rep. 553 (1995) 16

Faigman, *Making Law Safe For Science: A Proposed Rule For The Admission of Expert Testimony*, 35 Washburn L.J. 401 N.6 (1996) 11

G. Michael Fenner, *The Daubert Handbook: The Case, Its Essential Dilemma, and Its Progeny*, 29 Creighton L. Rev. 939 (1996) 21

Imwinkelried, *The Next Step After Daubert: Developing a Similarly Epistemological Approach to Ensuring the Reliability of Nonscientific Testimony*, 15 Cardoza L.R. 2271 (1994) 19

Petition for Certiorari, *Subaru of America, Inc. v. Compton*, Number 96-645 7

PETITION FOR A WRIT OF CERTIORARI

Petitioners Jeffrey L. Peitzmeier and Sherry L. Peitzmeier petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-14a) is reported at 97 F.3d 293 (8th Cir. 1996). The opinion of the district court (App., *infra*, 16a-22a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 4, 1996. (App., *infra*, 15a). Petitioners' Application for an extension of time to file their Petition for Certiorari was granted on December 17, 1996. (App., *infra*, 27a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RULE INVOLVED

Federal Rule of Evidence 702 provides:

Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or

to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

STATEMENT

Petitioner Jeffrey Peitzmeier was injured while using a tire-changing machine manufactured by respondent and sold to Peitzmeier's employer, Top Tech Automotive Garage, located in Yutan, Nebraska.

Respondent's machine, the RC20-AA, is designed to permit the operator to change a tire on a platform located above the ground. To do so, the operator first deflates the tire with a "bead loosener", which separates the tire from the rim of the wheel. The tire is then placed on the platform of the RC20-AA machine, and clamps are attached to the wheel rim to hold it in place while the damaged tire is removed, a new tire mounted and then inflated.

During the inflation process the operator listens for a "pop" sound, which indicates the "beads", wires in the wall of the tire, have "seated", that is, have sealed against the flanges of the wheel rim. Once seating has occurred the tire is inflated to its operating air pressure, and removed from the machine.

At the time he was injured, Peitzmeier was, unknown to him,[1] attempting to mount a sixteen-inch tire on a sixteen-and-one-half inch wheel. Unable to get the tire to "bead-up" on the wheel's rim, Peitzmeier inflated the tire to a pressure of sixty pounds-per-square inch. He was then informed of the mismatch of tire to wheel, and while attempting to deflate the tire, the bottom of the tire exploded, propelling the tire and rim into Peitzmeier's face, causing serious injuries.

Peitzmeiers brought suit in United States District Court for the District of Nebraska against Respondent, alleging various causes of action including one based on strict liability for design defect. After discovery, Respondent filed a Motion to exclude the testimony of Peitzmeier's expert, Dr. Alan Milner, under Rule 702 and the *Daubert* factors. Respondent also moved for summary judgment on all causes of action.

A. Proceedings in the District Court.

Petitioners proposed to offer the testimony of their expert, Dr. Alan Milner, in support of their claim that the RC20-AA machine suffered from design defects. Dr. Milner's affidavit disclosed that he was a Professional Engineer licensed in Arizona and had earned a bachelor of

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[1] Included in the testimony found inadmissible by the court below was Dr. Milner's testimony that the "mis-match" phenomena was common, because sixteen-inch wheels and sixteen-and-one-half wheels appear to be identical, and that sixteen inch tires appear to fit on sixteen-and-one-half inch wheels. Pet. C.A. App., 522, discussed *infra*, note 4.

science degree, a master of science degree, and a doctorate degree in Metallurgical Engineering. Dr. Milner studied design engineering principles and predictive failure analysis, and taught at the University of Arizona School of Engineering. He worked extensively in failure analysis and predictive failure analysis, and had consulted extensively in tire explosion cases, including explosions involving tire-changing machines. (P.C.A. App. 501).

Dr. Milner proposed to testify that the RC20-AA was defective because (1) the machine's design created a "launch-pad" effect, such that an exploding tire created force which propelled the tire and wheel assembly off the machine's platform into the face and head of an operator, (2) the machine wheel rim clamps were inadequate to restrain the tire and wheel when such an explosion occurred, (3) the machine had no device to limit the air pressure which an operator could place in the tire, (4) the machine had no interlock system which would prevent the operator from inflating a tire when the restraint system was not in place, and (5) the machine had no method to permit the operator to inspect the lower bead during inflation. (P.C.A. App. 512-544).

Respondent objected to Dr. Milner's testimony based solely on its alleged inadmissibility under *Daubert*: "The defendant contends that Dr. Milner's testimony is inadmissible under *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993). The Court agrees." (App. *infra*, 19a).

The district court, with no formal Rule 104 hearing, excluded Dr. Milner's testimony as inadequate under the

Daubert factors for evaluating the reliability of expert testimony. (*Id.* at 20a).[2]

The district court, having found Dr. Milner's entire testimony inadmissible, granted summary judgment for Respondents on all Petitioners' claims, including the claim based upon defective design. (App. *infra*, 22a).

B. Proceedings in the Court of Appeals.

The court of appeals affirmed the district court, concluding first that the *Daubert* factors were applicable to Dr. Milner's testimony (App. *infra*, 7a). The court explicitly rejected Petitioners' contention that the *Daubert* factors were inapplicable because Dr. Milner's testimony was based on basic engineering principles, and not some novel scientific methodology. (App. *infra*, 6a).

The court then conducted its own evaluation of Dr. Milner's testimony under the *Daubert* factors. Like the district court, the court of appeals focused its evaluation of Dr. Milner's testimony on his "failure to design or test" a device incorporating his proposed safety features. (App. *infra*, 7a-8a).

The "testing" factor was found unsatisfied because Dr. Milner conceded "he has neither designed nor tested for safety or utility any of the proposed safety devices

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[2] The court of appeals noted that Peitzmeier, in that court, argued that the district court erred in excluding Dr. Milner's testimony concerning consumer expectations. (App. *infra*, 9a). For a discussion of this testimony *see* fn 5, *infra*, p. 10).

that he claims are missing from the Hennessy tire changing machine." (App. *infra*, 7a). The court also stated the first *Daubert* factor was not satisfied because Dr. Milner "has never designed, built, or tested a platform that has been shown to reduce the launch effect of an exploding tire and wheel assembly while adequately supporting the tire and wheel assembly during the tire-changing process." (*Id.*).

The "peer review" factor was found unsatisfied because "not one of Milner's proposed changes to the tire-changing machine has been subjected to peer review." (App. *infra*, 7a-8a).[3] The "final *Daubert* factors" of the rate of error and general acceptance in the scientific community of the "proffered theories" were given similar treatment by the court of appeals. (App. *infra*, 8a).

The court of appeals thus concluded that Dr. Milner's proposed testimony on design defects "in light of the factors enumerated in *Daubert*" (id.) was properly excluded under Rule 702. The court also concluded that, "with Milner's testimony properly excluded" (App. *infra*, 9a) no genuine issues of fact remain on the Petitioners' strict liability claim.

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[3] The Circuit Court expressly rejected Peitzmeier's contention that Dr. Milner's previous court appearances in which he gave similar testimony concerning tire-changing machines and their design constituted "peer review" under *Daubert*. (App. *infra*, 8a).

REASONS FOR GRANTING THE PETITION

Petitioners are not the first this Term to present their case for this Court's review and clarification of the scope and meaning of *Daubert*. Petitioners in *Subaru of America, Inc. v. Compton*, in their Petition for Writ of Certiorari, Number 96-645, contended that the Tenth Circuit's ruling in *Compton v. Subaru of America, Inc.*, 82 F.3d 1513 (10th Cir. 1996) was "symptomatic of the pervasive confusion in the lower courts over *Daubert's* meaning." (at 9).

Petitioners here share that belief in a "pervasive confusion", as starkly illustrated by the Eighth Circuit's decision below, though they believe the Tenth Circuit's decision in *Compton* is correct. It is certainly true that the lower federal courts in this nation are currently diametrically, and irreconcilably, at odds over the meaning and applicability of the *Daubert* decision. It is also true that this conflict has surfaced in several circuit courts, where it is firmly and, absent review and clarification by this Court, inextricably entrenched.

Petitioners therefore believe that there now exists the kind of clear, explicit conflict among the Circuits that has historically motivated the exercise of the certiorari jurisdiction. This case is identical, for certiorari purposes, to *Insurance Corp. v. Compagnie Des Bauxites*, 456 U.S. 694 (1982), where the Third Circuit acknowledged its interpretation of a federal discovery rule was inconsistent with the interpretation given the same rule by the Fifth Circuit. *Compagnie Des Bauxites v. Ins. Corp. of M. Am.*, 651 F.2d 877, 885 (3d Cir. 1981). Moreover, the conflict seems unlikely to be reconciled without prompt action by this Court. Notwithstanding the many decisions applying (or

not applying) *Daubert*, and the many articles in legal journals bemoaning the state of these decisions, the circuit courts persist in this conflict. Indeed, just weeks before this Petition was prepared the Seventh Circuit highlighted the extent of the conflict in *Tyus v. Urban Search Management*, 102 F.3d 256 (7th Cir. 1996). There the court stated: "we do not agree with the Tenth Circuit's decision in *Compton v. Subaru of America, Inc.*, 82 F.3d 1513, 1518-19 (10th Cir. 1996), that it [Daubert] is limited to cases of novel scientific theories or methodologies." *Tyus*, 102 F.3d at 263.

Petitioners will document in more detail the conflicting decisions of the lower federal courts, and the important federal interests at stake in those decisions. Petitioners are mindful of the fact that this Court must, of necessity, reserve the certiorari jurisdiction for questions of general application, and cannot oversee the correctness of the decision of every lower federal court.

But before that showing, Petitioners wish to demonstrate to the Court how in their case, and doubtless others as well, the lower courts' confusion over the proper meaning and application of *Daubert*, ostensibly a purely federal concern, worked to deprive them of their rights under state law.

Under Nebraska law, which the circuit court stated was controlling (App., *infra*, 10a) a plaintiff in a strict liability action need not prove, as part of plaintiff's case, that an alternative, safer design of the product in question was feasible:

> Defendants claim that plaintiffs failed to show an alternative design which would have

> resulted in less severe injuries. Nebraska no longer requires proof of an alternative design for a claimant to recover under a claim of defective design.

Kudlacek v. Fiat Spa, 244 Neb. 822, 509 N.W.2d 603, 611 (1994). Yet, in their rush to apply the *Daubert* reliability factors to Dr. Milner's proposed testimony, both the district and circuit courts looked exclusively at those parts of his testimony relating to alternative designs and their feasibility. (App. *infra* 7a & 19a-20a)[4]. Finding inadequate under *Daubert* those aspects of Dr. Milner's proffered testimony which were not essential to establish the existence of a design defect under Nebraska law, the lower courts excluded *all* of Dr. Milner's proposed testimony, including proffered testimony which *was* relevant to Petitioners' design defect cause of action. See Pet. C.A. App. 538, 547-48, and 599, discussed *infra*, p.

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[4] In the court of appeals Respondents argued that Dr. Milner's proffered testimony amounted to a claim that the tire-changing machine was "defective because it lacks safety features proposed by the expert." C. A. Brief of Appellee at 28. This argument is without merit. It is clear from Dr. Milner's proffered testimony, discussed *infra*, pages 24-25, that in his opinion the machine was defective because it created the launch-pad effect, and because the wheel clamps were inadequate to restrain the wheel assembly in the event of an explosion like that which occurred here. His testimony concerning safety devices which would reduce the risk of the launch-pad effect was elicited by Petitioners as a response to Respondents expected "state of the art" defense under Nebraska law. *See* Neb. Rev. Stat. § 25-21,182 (Reissue 1989). ["In any product liability action . . . proof establishing that such design . . . was in conformity with the . . . prevailing state of the art . . . shall be a defense."]

24. As a result of this uncritical application of the *Daubert* factors, both the District Court and the Circuit Court failed to perform the essential judicial function mandated by Rule 104 and 702: to determine the relevance and nature of proposed expert testimony.[5]

I. The *Daubert* Decision's Mixed Message

Because both the district court and the circuit court excluded Dr. Milner's testimony solely under the *Daubert* "factors", and not upon his lack of qualifications or the "fit" of his testimony, Petitioners offer their understanding of the *Daubert* decision and its application. It is, after all, the uncertainty about *Daubert*'s meaning that is driving the present conflict among the circuit courts.

One holding in *Daubert* is clear and uncontroversial. Congress, in adopting Rule 702, did not at the same time intend to assimilate the "general acceptance" test of *Frye v. United States*, 54 App. D.C. 46 (1923). Indeed, Rule 702 supersedes *Frye*. *Daubert*, 509 U.S. at 589. But two other aspects of *Daubert* are decidedly less clear, and have engendered the current controversy.

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[5] Petitioners also proposed to offer Dr. Milner's testimony that the "mis-match" phenomenon, in which 16 inch tires are attempted to be mounted on 16.5 inch wheels, was sufficiently common such that Respondent would foresee such use, and users would not contemplate the degree of risk associated with such use. Pet. C.A. App., 522. The District and Circuit Courts' excluded this testimony as well, but only because both Courts believed no evidence existed showing a defective design. (See App. *infra*, 9a).

A. The "General Reliability" Requirement.

First, controversy exists over the extent to which *Daubert* holds that Rule 702 contains a general requirement that the judge, in addition to making the determinations of relevance and qualifications mandated by Rules 104 and 402, make an independent determination of the reliability of proposed expert testimony.[6] There are excerpts from the Courts' opinion (and surely few Supreme Court cases have been "excerpted" more than *Daubert* in such a short time)[7] which suggest Rule 702 does require a reliability inquiry.

For example, in response to Chief Justice Rehnquist's reluctance to pursue the full contours of the "gatekeeping" responsibility, the Court stated "[w]e believe the better course is to note the nature and source of the duty." *Daubert*, 509 U.S., at 589, n.7. This footnote, however, is appended to the Courts' statement that because "the *Frye* test was displaced . . . does not mean, however,

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[6] Chief Justice Rehnquist, dissenting in *Daubert*, explicitly refused to subscribe to the "observations" of the Court that reliability is a basis for admissibility under Rule 402. *Daubert*, 509 U.S. at 599 (Rehnquist, C.J., with whom Stevens, J. joins, concurring in part and dissenting in part). He did not deem it wise to incorporate such a requirement into Rule 702. *Id.* at 600-601. The Chief Justice's concerns about the effect of the Court's "general observations" in the lower federal courts now appear to have been prescient.

[7] In a recent article Professor David Faigman, University of California, Hastings College of Law, states that "well over one hundred articles have been published in response to the decision." Faigman, *Making Law Safe For Science: A Proposed Rule for the Admission of Expert Testimony*, 35 Washburn L. J. 401, 404, N.6 (1996).

that the Rules themselves place no limits on the admissibility of purportedly *scientific evidence*." *Id.* (emphasis added). The inference is thus strong that the "duty" referred to in note 7 is the judge's duty when confronted with "purportedly scientific evidence".

The Court also stated that:

> "The primary locus of *this obligation* is Rule 702, which clearly contemplates some degree of regulation of the subjects and theories about which an expert may testify."

Daubert, 509 U.S. at 589 (emphasis added). But "this obligation", which has its locus in Rule 702, is clearly the antecedent responsibility identified in the preceding paragraph that the judge "insure that any and all *scientific* testimony or evidence admitted is not only relevant, but reliable." *Id.* (emphasis added).

The Court's own characterization of the scope of its holding lends itself to misunderstanding. The Court stated that "Our discussion is limited to the scientific context because that is the nature of the expertise offered here." *Id.* at 590, n.8. But, the Court also noted that "Although the *Frye* decision itself focused exclusively on 'novel' scientific techniques, we do not read the requirements of Rule 702 to apply specially or exclusively to unconventional evidence." *Id.* at 593, n.11.

One might understand the latter statement as expanding the "reliability" inquiry to include all expert testimony, scientific or otherwise. Yet, the full text of footnote 11 makes it at least equally likely that the juxtaposition was between conventional and unconventional *scientific* evidence:

> "Of course, well established propositions are less likely to be challenged than those that are novel, and they are more handily defended. Indeed, theories that are so firmly established as to have attained the status of scientifc law, such as the laws of thermodynamics, properly are subject to judicial notice under Federal Rule of Evidence 201."

Id. at 593, n.11.

These ambiguous statements in the Court's holding have led circuit courts to subject nonscientific expert testimony to the *Daubert* reliability tests. For example, the court in *Berry v. City of Detroit*, 25 F.2d 1342, 1350 (6th Cir. 1994), *cert. denied*, 115 S. Ct. 902 (1995), excluded proffered expert testimony concerning the relationship between a city's alleged failure to discipline police officers and a subsequent fatal shooting by a police officer. It did so by applying the *Daubert* factors to the testimony, concluding the factors were applicable because:

> " 'Under the Rules the trial judge must ensure that any and all . . . testimony or evidence admitted is not only relevant, but reliable'." 25 F.2d at 1350, citing 113 S. Ct. at 2795.[8]

Moreover, it is clear other circuit courts have understood these parts of the *Daubert* opinion to require "reliability" tests of the *Daubert* variety in all cases of proffered expert testimony. In *United States v. Posado*, 57 F.2d 428, 432 (5th Cir. 1995), the court stated that *Daubert*

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[8] Notably absent in the *Berry* court's quotation from *Daubert* is the word "scientific".

requires the trial judge to determine that all expert testimony have "sufficient evidentiary reliability to be admissible as 'scientific, technical, or other specialized knowledge' ".

The Seventh Circuit in *Tyus* explicitly held that " . . . the *Daubert* framework is appropriate for all kinds of expert testimony . . . ". *Tyus*, 102 F.3d at 263.

Even Circuits undecided on these issues have read a general reliability requirement into *Daubert*. For example, in *Bogosian v. Mercedes-Benz of North America*, 1997 W.L. 3276*5 (1st Cir. 1997), the First Circuit affirmed the district court, which had excluded the expert testimony of a "forensic automotive mechanic" using the *Daubert* factors. The circuit court assumed arguendo that the expert was not proposing to testify to "scientific knowledge", but held nonetheless that "the admissibility of the testimony was still controlled by the requirement of factual relevance *and foundational reliability*. *See* 509 U.S. at 591-92." *Id.* (emphasis added).

Thus, the Eighth Circuit's terse rejection of Petitioners' argument that because Dr. Milner's testimony was based on his education, experience, and basic engineering principles the *Daubert* factors were not applicable (App. *infra*, 6a) would be followed in the Sixth, Seventh, and First Circuits, and probably in the Fifth Circuit.[9]

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[9] In *Carroll v. Morgan*, 17 F.3d 787 (5th Cir. 1994) the court found a physician's testimony admissible because it was based on "thirty years of experience" (*id.* at 790) and did not involve an "unconventional scientific theory." *Id.* at 789. The *Posado* court did not mention *Carroll*. The *Posado* court's discussion of

In direct conflict to those circuits, of course, stand the Tenth Circuit and the Second Circuit. In *Compton*, the Tenth Circuit explicitly held that, because the proffered testimony of the expert, a mechanical and aerospace engineer, was not based upon any particular methodology or technique, "*Daubert* has little bearing on [the expert's] testimony." *Compton*, 82 F.2d at 1518.

The Second Circuit, in *Iacobelli Construction, Inc. v. County of Monroe*, 32 F.3d 19 (2nd Cir. 1994), refused to apply the *Daubert* factors to proffered testimony of geotechnical consultants in a construction contract case. The Second Circuit stated that *Daubert* was intended only to require trial judges "evaluating scientific knowledge" to apply the *Daubert* factors to determine reliability. *Id.* at 25.[10]

It thus appears clear that the Circuits are in direct conflict on the extent to which, if at all, Rule 702 as interpreted by *Daubert* includes an independent "reliability" inquiry for all expert testimony. Moreover, this conflict is a result of the mixed signals sent by *Daubert* on the "gatekeeper" function. Given the central

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Daubert is by its terms applicable to all expert testimony. In *Carroll* the court addressed its *Daubert* remarks only to scientific testimony. *Cf. Holbrook v. Lykes Bros. S.S. Co.*, 80 F.3d 777, 785 (3d Cir. 1996).

[10] The Ninth Circuit appears to side with the Second and Tenth Circuits on this issue. In *Thomas v. Newton Int'l Enter*, 42 F.3d 1266 (9th Cir. 1994), the court stated that "*Daubert* was clearly confined to the evaluation of scientific expert testimony." *Id.* at 1270 n. 3. The court found the expert's testimony admissible solely on the basis of his 29 years of experience in the area in which he proposed to testify. *Id.*

role of expert witnesses in design defect cases such as this, and given that such experts are commonly professional engineers, the applicability of *Daubert* to their testimony is of vital concern to both courts and litigants alike.[11]

Petitioners believe review is warranted here, if only to clarify the extent to which Rule 702 includes a general "reliability" inquiry for all expert testimony. This is particularly pressing if, as Petitioners believe, "reliability" found its way into Rule 702 not as a general admonition to judges in some fashion to grade the accuracy of expert testimony, but merely as a way of identifying when an expert proposes to testify about "scientific knowledge".

The *Daubert* opinion stressed that:

> "Although 'the difference between accuracy, validity and reliability may be such that each is distinct from the other by no more than a hen's kick' [citation omitted] our reference here is to *evidentiary* reliability – that is, trustworthiness". 509 U.S. at 590-591, n.9.

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[11] Those studying the *Daubert* factors in operation have discerned a marked tendency towards exclusion of expert testimony. *See* Agrimonti, *The Limitation of Daubert and Its Misapplication to Quasi-Scientific Experts, a Two-Year Case Review of Daubert v. Merrill Dow Pharmaceuticals, Inc., 113 S.Ct. 2786 (1993)*, 35 Washburn L.J. 134, 135 (1995). Moreover, the authors of a study of product liability cases state that most courts which apply *Daubert* to design and engineering issues do so without first determining whether such application is appropriate. *See* Nelson G. Apjohn & Suzanne M. Quill, *Post-'Daubert' Admissibility of Expert Testimony of Mechanical and Engineering Issues*, 23 Product Safety and Liability Rep. 553 (1995).

Noting that firsthand knowledge has always been the " 'most pervasive manifestation' of the common law insistence upon 'the most reliable sources of information . . . ' " 509 U.S. at 592 (citation omitted), the Court in *Daubert* examined the extent to which the Federal Rules of Evidence permitted substitution for "first-hand knowledge" as the guarantor of "trustworthiness."

In the case of expert testimony *generally*, The Court concluded:

> "Unlike an ordinary witness, see Rule 701, an expert is permitted wide latitude to offer opinions, including those that are not based on first-hand knowledge or observation. See Rules 702 and 703. Presumably, this relaxation of the usual requirement of first-hand knowledge . . . is premised on an assumption that the expert's opinion will have reliable basis in the knowledge and experience of his discipline."

509 U.S., at 592. Trustworthiness, and thus reliability, for experts in general is determined by the inquiry into qualification, relevance, and "fit" required by Rules 104 and 702. *Id.* at 592-593. In this sense, and only this sense, does *Daubert* read a "reliability" evaluation in Rule 702, at least for non-scientific evidence.

Where an expert proposes to testify concerning *scientific knowledge*, however, the *Daubert* Court recognized that a unique trustworthiness problem presents itself. While training and experience will lend trustworthiness to, for example, an electrician's opinion that a building is

improperly wired, or a gang member's opinion on gang-related activity,[12] the "knowledge and experience" of the scientist's discipline will not. This is because the electrician's training in basic electrical science, and his experience in the application of that training serve as the basis for connecting the state of the building's electrical wiring and the opinion that the wiring is inadequate or unsafe. The electrician's testimony is "technical knowledge", not "scientific knowledge", but not because it does not involve *science*. It is not scientific knowledge because the science is not the basis for the expert's opinion. *See Officer v. Teledyne Republic/Sprague*, 870 F.Supp. 408, 410 (D. Mass. 1994).

By contrast, the *Daubert* Court held, where the science *is* the basis for the connection between the facts and the expert's opinion, the expert testifies about "scientific knowledge" only if the science itself has reliability. 509 U.S. at 590.

> "In a case involving scientific evidence, *evidentiary reliability* will be based upon *scientific* validity."

Id. at 590-591, n.9.

"Reliability" for "scientific knowledge" is determined, the Court concluded, by exposing the science, that is the methodology, to the testing, peer review, publication, rate of error, and general acceptance process.

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[12] See *United States v. Johnson*, 28 F.3d 1487 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 768 (1995), where a gang member was permitted to testify concerning gang activity with no *Daubert* showing.

It would greatly ease the burden on courts and litigants alike if this Court would give further guidance on the scope of the "gatekeeper" function of trial courts. In addition to preventing the kind of erroneous application of the *Daubert* factors made by the Eighth Circuit and other courts, such guidance would direct the efforts of the lower federal courts toward formulating a fair and workable test for the admission of nonscientific evidence.[13]

B. The Application of the *Daubert* Factors.

The second aspect of *Daubert* which has engendered conflict is the proper application of the so-called *Daubert* factors. That is, if the gatekeeper function of the trial judge under Rule 702 requires some inquiry on reliability beyond qualification, relevance, and "fit", must the judge establish that reliability by use of the *Daubert* factors?

With respect to testimony characterized as nonscientific, and thus technical or other specialized knowledge,

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[13] Professor Imwinkelried believes this to be the more difficult task in Rule 702 questions. After concluding the *Daubert* factors should not be applied beyond scientific knowledge, he stated:

> "[I]n the long term, we may discover that *Daubert* addressed the easier part of the problem of expert testimony; . . . the development of objective validation standards for nonscientific opinion is likely to prove to be a more difficult task."

Imwinkelried, *The Next Step After Daubert: Developing a Similarly Epistemological Approach to Ensuring the Reliability of Nonscientific Testimony*, 15 Cardozo L.R. 2271, 2283, 2294 (1994).

the Circuits are also in conflict. The Second Circuit, consistent with its holding in *Iacobelli*, held in *McCullock v. H.B. Fuller Co.*, 61 F.3d 1038 (2nd Cir. 1995), that an engineer's testimony was "specialized knowledge" gained from background and practical experience, and admissible without reference to the *Daubert* factors. *Id.*, at 1043.

In *Thomas v. Newton Int'l Enter, supra*, the Ninth Circuit held that the *Daubert* factors were "clearly confined to the evaluation of scientific testimony . . . nonscientific testimony need only be linked to some body of specialized knowledge or skills." 42 F.3d at 1270, n.3.

The Tenth Circuit in *Compton* expressly refused to apply the *Daubert* factors to expert engineering testimony which was based upon "general engineering principles and his twenty-two years of experience as an automotive engineer." 82 F.3d at 1518. Moreover, the court found that the *Daubert* factors had "little bearing" on the matter, because the engineer's testimony was not based on any particular methodology or technique. *Id.*

In direct conflict with these decisions are the Sixth Circuit's decisions in *Berry v. Detroit, supra*, and *Cummings v. Lyle Indus.*, 93 F.3d 362 (1996), as well as the Seventh Circuit's decision in *Tyus, supra*. Of course, the Eighth Circuit here explicitly held that the *Daubert* factors determined the reliability of Dr. Milner's testimony, whether based on training, experience, basic engineering

principles, or conventional scientific theories. (App., *infra*, 6a-7a).[14]

Thus, the Second, Ninth, and Tenth Circuits refuse to apply the *Daubert* factors unless some particular, novel scientific methodology or technique is the basis for the expert testimony. The Sixth, Seventh, and Eighth Circuits apply those factors to all proffered expert testimony, at least where the testimony has some relation to "science."

Moreover, decisions from district courts in circuits which have not taken a definite position on this question demonstrate a similar conflict. For example, in *Byrnes v. Honda Motor Co.*, 887 F.Supp. 279, 282 (S.D. Fla. 1994), the court, using *Daubert's* factors, excluded testimony that the absence of a leg guard on a motorcycle was a design defect. Conversely, in *Freeman v. Case Corp.*, 924 F.Supp. 1456 (W.D. Va. 1996), the court refused to apply *Daubert's* factors to an engineer's testimony concerning the design of a riding mower. The court called the *Byrnes* decision "misguided," *Id.* at 1466. (For a comprehensive collection of post-*Daubert* decisions *see* G. Michael Fenner, *The Daubert Handbook: The Case, Its Essential Dilemma, and Its Progeny*, 29 Creighton L. Rev. 939, 955-975 (1996)).

As these and other district court cases show, the conflict among the circuits is a growing and multiplicious

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[14] Since the Eighth Circuit held *Daubert's* factors applicable whether Dr. Milner's testimony was based on generally accepted engineering principles, like the experts in *Compton* and *McCullock*, or some particular scientific methodology, no finding was made on the exact nature of Dr. Milner's relevant testimony. That it was based on basic engineering principles is discussed *infra*, p. 24.

problem. Inevitably, and sooner rather than later, the circuit courts hearing these district court cases on appeal will be forced to take a position on the *Daubert* issues. Nothing Petitioners have seen in the circuit court decisions discussed above (and certainly not the Eighth Circuit's) leads them to believe that a position, once taken, will change, barring action by this Court. In the meantime, of course, hundreds of litigants will suffer the same fate as Petitioners did below: an erroneous application of Rule 702 will deny them their constitutional right to a jury trial.

II. The Eighth Circuit Erred in Excluding Milner's Testimony

The circuit court's application of the *Daubert* factors to exclude Dr. Milner's proffered *relevant*[15] expert testimony was erroneous, for a number of reasons.

First, for the reasons stated above, Petitioners believe that the *Daubert* Court did not purport to make "reliability" an independent inquiry applicable to all expert evidence. The circuit courts on this side of the conflict have reached the proper understanding of

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[15] As noted earlier, *supra* p. 9, under Nebraska law the only *relevant* expert testimony, that is, testimony necessary to sustain Petitioner's burden of proof in a design defect case, is testimony about the actual design of Respondent's machine. Though excluded, that testimony was in fact never evaluated by the circuit court under Rule 104 or 702. Dr. Milner's testimony concerning alternative design was thus not, in this sense, relevant. It was that testimony exclusively, however, which the circuit court evaluated under the *Daubert* factors.

Daubert, and those which give the *Daubert* factors general application err.

Second, even admitting that Rule 702 requires the judge to exercise some "gatekeeper" function, Petitioners believe uncritical application of the *Daubert* factors to be erroneous. Engineering testimony like Dr. Milner's testimony, though related to science, is not "scientific knowledge" as that term is used in Rule 702. Rather, his proffered testimony is technical or specialized knowledge, *gained* from and *validated* by his education and experience. Dr. Milner's testimony, like that of the engineers in *Compton, McCullock* and *Officer, supra*, was not based upon a particular methodology or technique. That is, his testimony would "assist the trier of fact" not because of the "reliability" of his methodology, but because of his training and experience. His proffered testimony was fundamentally unlike the expert testimony in *Daubert*. A simple example shows the difference.

A medical expert, highly qualified with impeccable credentials and years of clinical experience, may believe that the use of cellular telephones can cause brain cancer. But because cancer does not leave evidence of its causation, all the training and experience of the medical expert by itself is valueless in establishing such causation. Regardless of how many cases of brain cancer she has seen and treated, that experience alone does not elevate her opinion above her own subjective, unsupported belief. Without more, it is inadmissible under Rule 702. But if the expert gathers the appropriate medical data, applies to it the proper medical and statistical technique, factors in the margin of error, and tests her hypothesis, then she may testify about the link between cellular

phone use and brain cancer, because now the proffered testimony is "scientific knowledge." The method she employed, not her training and experience, validates her conclusions.

Contrast that hypothetical to Dr. Milner's excluded testimony. Dr. Milner carefully identified the design defects of Respondent's machine as follows:

> "It was defective because it has a method of supporting the tire/wheel assembly in its operating position, which represents an efficient launching platform situation. It has no means of restraining the tire/wheel assembly in place on the platform or table top. And it has no pressure limitation and direct pressure reading inflation system attached to it."

Pet. C.A. App. 511-512.

Based on his background in design engineering principles, *Id.* at 501, failure analysis, *Id.* at 502, mathematics and physics, his experience in observing machines such as Respondent's being operated by persons servicing tires and wheels, *Id.* at 501, and his years as a consultant in over 350 cases involving failure analysis in tire bead explosions, *Id.* at 504, and other mechanical engineering issues, *Id.* at 529, Dr. Milner concluded the design was unsafe. He also conducted explosion tests on the machine, *Id.* at 547-548, and used data from similar tests conducted by Respondent. *Id.* at 599. He tested other tire changing machines for a "launch-pad" effect, *Id.* at 562, and tested a "post and cone" tire changing machine to evaluate its wheel restraint properties. *Id.* at 563. Given his qualifications and experience and given further that his conclusions were related to those qualifications and

experience, Dr. Milner's expert, specialized knowledge would assist the trier of fact without the need to demonstrate the validity of any particular methodology. The science behind Dr. Milner's testimony did not ensure its "trustworthiness": his training and experience did.[16]

This is not to say technical or specialized knowledge requires no validation. That validation, however, is already included in Rule 702's requirement that the expert testimony "fit" the purpose for which it is offered. *Daubert*, 509 U.S. at 591. Assuming a qualified expert has technical or specialized knowledge, "fit" requires that his testimony concern a factual issue related to that technical or specialized knowledge. If so, it will "assist the trier of fact" and is admissible. As the *Compton* court observed, pre-*Daubert* inquiries under Rule 702 required only that "a logical basis" existed for such expert's conclusions. Any weaknesses in that basis "go to the weight and not the admissibility of the testimony." *Compton*, 82 F.3d. at 1518, citing *Jones v. Otis Elevator Co.*, 861 F.2d 655, 663 (11th Cir. 1988).

The "logical basis" for Dr. Milner's conclusion that the tire-changing machine had design defects was clearly

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[16] As stated earlier, neither the district court nor the circuit court purported to exclude Dr. Milner's testimony because of a lack of qualifications. Indeed, the circuit court made absolutely no reference to those qualifications when discussing that exclusion. (App., *infra*, 7a-8a). Courts considering Dr. Milner's qualifications have accepted him as an expert in this area. For example, in *Pacheco v. Coats*, 26 F.3d 418 (1994), and *Meneely v. Denman Tire Corp.*, No. 93-10151 (N.D. Fla., July 20, 1995), Dr. Milner was permitted to testify concerning the design defects of the tire-changing machine involved there.

his training and experience. The risk created by the physical relationship of the tire to the machine's platform, and the ability of the side clamps to restrain the tire and wheel assembly in the event of explosive force, are questions which Dr. Milner's training and experience prepared him to answer. Obviously, most jurors would not have the background necessary for an independent evaluation of those questions, so Dr. Milner's testimony would clearly be helpful to the jury. Rule 702 requires no other inquiry on admissibility.

CONCLUSION

The conflict among the circuits created by their interpretation of *Daubert* is real, important, and irreconcilable. It will continue, increase, and become entrenched in the federal courts unless this Court resolves the conflict. Petitioners submit that theirs is the appropriate case to resolve the conflict. The *Daubert* issues are plainly and squarely joined, with none of the factual side-roads presented in other *Daubert*-related petitions to this Court. The explicit, and only basis for the Eighth Circuit's affirmance of the dismissal of Petitioners' design defect case was the lack of evidence of design defect. Petitioners' proffered evidence was excluded solely under the *Daubert* factors, notwithstanding Petitioners' claim that such factors were inappropriate to the proffered expert testimony. Petitioners deserve, and the federal court system needs, a direct answer to their claim. Only this Court can do that.

WHEREFORE, Petitioners respectfully pray that their Petition for Certiorari be granted.

Respectfully submitted,

TERRY M. ANDERSON
Counsel of Record
Creighton Law School
Omaha, Nebraska 68178
(402) 280-3099
HAUPTMAN, O'BRIEN,
WOLF & LATHROP, P.C.
9290 West Dodge Road
Suite 403
Omaha, Nebraska 68114
(402) 390-9000

BRUCE R. KASTER
GREEN, KASTER,
& FALVEY, P.A.
P. O. Box 2720
Ocala, Florida 34478
(904) 732-9252

LARRY C. JOHNSON
JOHNSON & VAUGHN P.C.
114 East Military
Fremont, NE 68025
(402) 721-2430

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-2202

Jeffrey L. Peitzmeier; Sherry L. Peitzmeier, Appellants, vs. Hennessy Industries, Inc., a New Jersey Corporation, d/b/a through its divisions Coats Company and Solar Industries, Inc., Appellee.	*	Appeal from the United States District Court for the District of Nebraska.

Submitted: December 12, 1995

Filed: October 4, 1996

Before BOWMAN and LOKEN, Circuit Judges, and SCHWARZER,* District Judge.

BOWMAN, Circuit Judge.

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* The HONORABLE WILLIAM W. SCHWARZER, United States District Judge for the Northern District of California, sitting by designation.

Jeffrey Peitzmeier and his wife, Sherry, appeal the adverse grant of summary judgment by the District Court[1] in their product liability suit against Hennessy Industries, the manufacturer of the tire-changing machine at issue in this case. We affirm.

I.

The background facts are not in dispute. This action arose out of an accident that took place when Jeffrey Peitzmeier, a mechanic at Top Tech Automotive Garage in Yutan, Nebraska, was changing a tire using a Hennessy tire-changing machine.

The advantage of the Hennessy design is that the operator changes the tire on a platform above the ground instead of kneeling down or bending over and doing the work on the ground. The machine makes it easier to deflate and demount the old tire and to mount and inflate the new tire. Removing air from the old tire is accomplished by a "bead loosener," a mechanism that pushes the tire away from the rim of the wheel. On the Hennessy RC20-AA tire changer, the model at issue here, the bead loosener is on the side of the machine. After the bead loosening process is complete, the operator places the tire and wheel onto the platform of the machine, where clamps are placed on the rim of the wheel to hold it in place for the demounting, mounting, and inflation phases of the tire-changing procedure.

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[1] The Honorable William G. Cambridge, Chief Judge, United States District Court for the District of Nebraska.

In inflating the tire, the operator uses an inflation hose, which he controls by depressing a foot pedal. An air pressure gauge displays the pressure in the tire in "psi" (pounds per square inch) as the operator inflates the tire. Proper inflation requires seating the "beads" (small wires in the wall of the tire) against the outer flanges of the wheel. When the beads seat they emit a "pop" sound, indicating that the tire then may be inflated to its service pressure.

Top Tech bought the tire changer from Hennessy in 1988. It came with a customer information packet consisting of operating instructions, warranty information, and warnings. The printed instructions and bold face labels included warnings: (1) that until the beads are seated a tire should not be inflated in excess of forty psi, (2) that over-inflation can cause an explosion of the tire that may propel the tire, rim, or equipment upward with sufficient energy to cause injury or death, (3) that the operator should keep his hands and body away from the inflating tire, (4) that the tire and rim should be inspected for wear or defects before mounting, and (5) that the tire changer is not intended to be a safety device for restraining exploding tires, tubes, rims, or bead-seating equipment. Peitzmeier was an experienced garage mechanic who, from 1988 to June 4, 1992, the date of the accident, had used the tire changer without incident approximately 150 to 200 times. On the occasion that gave rise to this lawsuit, Peitzmeier attempted to mount a sixteen-inch tire on a sixteen-and-one-half-inch wheel.

Because Peitzmeier had mismatched the smaller tire and the larger wheel, the tire would not properly fit, or "bead up," on the rim. After some difficulty, Peitzmeier

asked the owner of the garage, Lyle Foster, to help him. Foster suggested that Peitzmeier beat on the tire with a rubber mallet. Peitzmeier tried beating on the tire with a mallet, but the tire still did not fit properly. Foster next suggested that Peitzmeier add more air to the tire. Despite Hennessy's warning labels stating that the operator should not inflate the tire to more than forty psi while seating beads and that over-inflation can cause the tire to explode, Peitzmeier added more air to the tire, increasing the tire pressure to sixty psi.

When Foster learned that Peitzmeier was still having problems changing the tire, he examined the tire himself and discovered the mismatch of smaller tire to larger wheel. When Foster explained to Peitzmeier that he had mismatched the tire and wheel, Peitzmeier responded, "Oh, no wonder," and began to release air from the tire. As Peitzmeier did so, the tire exploded and he was injured as the force of the explosion propelled the tire and rim into his face and head.

The Peitzmeiers filed suit against Hennessy, alleging causes of action in strict liability and negligence.[2] After discovery had been completed, Hennessy filed a motion for summary judgment, arguing, among other things, that the testimony of the Peitzmeiers' expert, Alan Milner, was inadmissible under Federal Rule of Evidence 702 as

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[2] The Peitzmeiers evidently have abandoned their negligence claims on appeal, as their arguments focus only on strict liability for design defect and strict liability for failure to warn. In any case, our analysis would apply with even stronger force to any asserted negligence claims, since such claims have a higher threshold of proof than strict liability claims.

interpreted by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786 (1993).

The District Court granted Hennessy's motion for summary judgment, holding that Milner's testimony was inadmissible under Federal Rule of Evidence 702 and *Daubert*, and that based on the admissible, undisputed evidence Hennessy was entitled to judgment as a matter of law. The Peitzmeiers appeal.

II.

The Peitzmeiers argue that the District Court abused its discretion in excluding Milner's testimony. Decisions concerning the admission of expert testimony lie within the broad discretion of the trial court, and these decisions will not be disturbed on appeal absent an abuse of that discretion. *Westcott v. Crinklaw*, 68 F.3d 1073, 1075 (8th Cir. 1995).

The admissibility of expert testimony is governed by Federal Rule of Evidence 702, which states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

The Supreme Court in *Daubert* makes it plain that the trial court is to act as a gatekeeper in screening such testimony for relevance and reliability, that is, make an assessment whether the reasoning and methodology underlying the

testimony is scientifically valid. *See Daubert*, 113 S.Ct. at 2796. In doing so, the court should consider, among other factors (1) whether the theory or technique "can be (and has been) tested"; (2) "whether the theory or technique has been subjected to peer review and publication"; (3) "the known or potential rate of error"; and (4) whether the theory has been generally accepted. *Id.* at 2796, 2797.

In this case, the Peitzmeiers sought to establish through Milner's testimony that the tire changer was defectively designed. Milner would have testified that in his opinion simple design changes on the machine would eliminate the potential for injuries and that the tire changer is defective in design in that (1) the machine acted as a "launch pad" for the exploding tire and wheel assembly, (2) the clamps did not restrain the exploding tire and wheel assembly, (3) the machine could not limit the amount of air pressure the operator could put into the tire, (4) the machine had no interlock system that would prevent the operator from inflating the tire unless the restraint system was in place, and (5) the machine had no mirror or other device by which the operator could inspect the lower bead during inflation.

As a threshold matter, the Peitzmeiers argue that *Daubert* is inapplicable to Milner's testimony, contending that his opinions are founded on basic engineering principles, whereas *Daubert* applies only to novel scientific testimony. This argument fails, for our Court has not given *Daubert* so narrow a reading. *See, e.g., Gier v. Educational Serv. Unit No. 16*, 66 F.3d 940, 943-44 (8th Cir. 1995) (applying *Daubert* to psychological evaluations in cases of alleged child abuse); *Pestel v. Vermeer Mfg. Co.*, 64 F.3d 382, 384 (8th Cir. 1995) (applying *Daubert* to testimony of

mechanical engineer). We conclude that the *Daubert* analysis is properly applied to Milner's proffered testimony.

We first consider whether Milner's theories or techniques have been tested. In that regard, Milner concedes that he has neither designed nor tested for safety or utility any of the proposed safety devices that he claims are missing from the Hennessy tire-changing machine. His only demonstration of an alternative design is a series of rough sketches that have not been adapted into engineering drawings, much less prototypes. Milner has shown no factual basis to support an opinion that his design changes are feasible or that they would not hinder the efficacy of Hennessy's present tire-changing model.

At the heart of Milner's opinion that the tire changer was defective is his theory that the rotating platform on the tire changer acted as a launch pad, which served to propel the tire upward when the explosion occurred. Milner admits, however, that he has never designed, built, or tested a platform that has been shown to reduce the launch effect of an exploding tire and wheel assembly while adequately supporting the tire and wheel assembly during the tire-changing process. Clearly, Milner's proffered testimony does not satisfy the first *Daubert* factor.

Next we consider whether the theory or technique has been subjected to peer review. While not required for admissibility, "submission to the scrutiny of the scientific community is a component of 'good science,' in part because it increases the likelihood that substantive flaws in methodology will be detected." *Daubert*, 113 S.Ct. at 2797. In this regard, not one of Milner's proposed changes to the tire-changing machine has been subjected

to peer review. The Peitzmeiers argue that Milner's theories have in fact been subjected to peer review because he has testified about them in court in other products liability cases. We reject the suggestion that cross-examination at trial and the number of Milner's court appearances in design-defect cases can take the place of scientific peer review. Because Milner's concepts are unfinished and untested, and have not been subjected to peer review, any testimony from Milner about how his proposed design changes would have reduced Peitzmeier's injuries is wholly speculative.

The final *Daubert* factors are the known or potential rate of error and the general acceptance in the scientific community of the proffered theories. Because Milner has not conducted any experiments or testing of any kind, there cannot be a known rate of error for his results. Likewise, no evidence is offered concerning a "potential" rate of error. Moreover, the Peitzmeiers offer no testimony regarding the general acceptance of either Milner's theory or his methodology.

Having carefully reviewed Milner's proffered testimony on design defect in light of the factors enumerated in *Daubert*, we conclude that the District Court did not abuse its discretion in excluding this testimony because of its failure to satisfy the standards of Rule 702.[3]

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[3] The Peitzmeiers' citation to the opinion of another federal district court that denied a similar motion to exclude Milner's testimony in a tire changer case is unavailing. *See Meneely v. Denman Tire Corp.*, No. 93-10151 (N.D.Fla. July 20, 1995). The conclusions reached by a district court in a different case have no bearing on the question of whether the District Court abused its discretion in this case.

The Peitzmeiers also argue that the District Court erred in excluding Milner's testimony regarding consumer expectation. We need not and do not address this issue. Testimony on consumer expectation is relevant only to show that a defect in a product makes the product unreasonably dangerous and unsafe for its intended use. Here we do not reach that step of the analysis, because we hold that the Peitzmeiers have failed to survive summary judgment on the antecedent question of whether there was a defect in the Hennessy tire changer. *See infra* part III.A.

III.

The Peitzmeiers argue that the District Court erred in granting summary judgment for Hennessy on their strict liability defective-design and failure-to-warn claims. We review *de novo*. *Brodnicki v. City of Omaha*, 75 F.3d 1261, 1264 (8th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3086 (U.S. July 23, 1996) (No. 96-129). We will affirm the judgment if the record shows that there is no genuine issue of material fact and the prevailing party is entitled to judgment as a matter of law. *Id.*; *see also* Fed. R. Civ. P. 56(c).

With Milner's testimony properly excluded, we conclude there are no genuine factual disputes on these claims and that Hennessy is entitled to judgment as a matter of law.

A.

To defeat Hennessy's motion for summary judgment on the Peitzmeiers' claim of strict liability for defective

design under Nebraska law (which the parties agree applies here), the Peitzmeiers needed to show genuine issues of material fact on the five elements of the cause of action: that Hennessy placed the tire changer on the market knowing that it would not be inspected for defects before use; that the tire changer was defective when sold; that the alleged defect was a proximate cause of the injuries Peitzmeier sustained while using the tire changer "in the way and for the general purpose for which it was designed and intended"; that the alleged defect made the tire changer "unreasonably dangerous and unsafe for its intended use"; and that Peitzmeier's "damages were a direct and proximate result of the alleged defect." *Kudlacek v. Fiat S.p.A.*, 509 N.W.2d 603, 610 (Neb. 1994) (quoting syllabus of the court in *Rahmig v. Mosley Mach. Co.*, 412 N.W.2d 56, 58-59 (Neb. 1987)).

The Peitzmeiers have not presented any evidence, apart from Milner's inadmissible opinions, to support a finding of defective design. Instead, the evidence all points in one direction: toward a finding that the tire changer was not defective, and that it certainly was not the proximate cause of Peitzmeier's injuries. The tire changer was sold in its intended condition, free of any manufacturing defects, and had been used by Peitzmeier before the accident some 150 to 200 times without incident. The Peitzmeiers offer no evidence that the machine was designed or marketed to prevent a tire from exploding or to restrain a tire if it did explode, so it follows that the machine's failure to so do in this case was not a defect. Further, there is no evidence that the tire changer

itself exploded or that it caused the tire and wheel assembly to explode. Instead, the uncontroverted evidence shows that Peitzmeier's over-inflation of the tire and mismatching of the tire and the wheel caused the explosion. As any adult – most especially an experienced mechanic – would surmise, an over-inflated tire (especially one smaller than the wheel on which it is mounted) is prone to explode. Here it was the operator, not the tire-changing machine, who mismatched the tire and wheel and then inflated the tire well beyond the recommended safe psi.

The District Court properly determined that Hennessy was entitled to summary judgment on the Peitzmeiers' defective design claim.[4]

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[4] The Peitzmeiers argue that "crashworthiness" or "enhanced injury" should apply to their case. The crashworthiness theory is used to hold automobile manufacturers liable where, even though an alleged defect in the automobile was not the proximate cause of the initial collision, a manufacturer may nonetheless be liable for injuries sustained in the second collision within the vehicle. *Kudlacek v. Fiat S.p.A.*, 509 N.W.2d 603, 610 (Neb. 1994). "Under a theory of crashworthiness, the manufacturer is liable for only that portion of the damages caused as a result of the defective design. Therefore, the plaintiff must show that his injuries were enhanced as a result of the defective design of the vehicle." *Id.* In cases involving "indivisible" injury, a plaintiff must establish that the alleged defect was a substantial factor in causing the alleged enhanced injuries. *Id.* at 611. Because the Peitzmeiers have failed to survive summary judgment on their claim that the tire changer is a defective product, we need not and do not reach the issue of enhanced injury.

B.

The Peitzmeiers also argue that Hennessy knew of the "bead hang-up"[5] phenomenon, and its relationship to the "launch pad" effect, and did not adequately warn of these dangers on the tire changer. The Peitzmeiers do not allege that Peitzmeier himself did not know of the dangers of "bead hang-up," but only that Hennessy provided no warnings of the danger.

Under section 402A of the Restatement (Second) of Torts, although a product may be free from manufacturing or design defects, it nonetheless may be defective if the manufacturer fails to warn or inadequately warns users about dangers inherent in the use of the product that the manufacturer knows exist and about which the user is likely to be unaware. Restatement (Second) of Torts § 402A cmt. j (1965). The duty to warn does not arise, however, "if the user knows or should know of the potential danger, especially when the user is a professional who should be aware of the characteristics of the product." *Strong v. E.I. DuPont de Nemours Co.*, 667 F.2d 682, 687 (8th Cir. 1981) (applying Nebraska law in negligent failure to warn case).

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[5] The "bead hang-up" phenomenon occurs on those occasions when the operator of a tire changer is unable to mount a tire because a wheel-tire mismatch, rust, imperfections in the wheel, improper lubrication, or other condition causes one or more of the tire beads to "hang up" and not slide across the wheel surface and seat against the rim. If the operator tries to force a "hung-up" bead to seat by over-inflation of the tire, the bead wires in the tire can break, causing a sudden release of pressurized air – an explosion.

As previously mentioned, the Hennessy tire changer was equipped with explicit warnings. "Where warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous." Restatement (Second) of Torts § 402A cmt. j. The warnings provided by Hennessy describe the hazards of over-inflation, warn the operator not to exceed forty psi of air pressure to seat beads, and warn the user never to exceed the tire manufacturer's recommended air pressure. The warnings on the tire changer not only alert the operator to the danger of serious injury or death if all warnings are not followed, but they also specifically warn the operator to keep his hands and entire body away from the inflating tire. Furthermore, the warning label gives notice that the tire changer is not intended to be a safety device for restraining exploding tires. These warnings fully satisfy any duty to warn that may have been present in this case.

Finally, even if we assume for the sake of argument that the warnings were somehow inadequate, the Peitzmeiers have made no showing that any such inadequacy was the proximate cause of Peitzmeier's injuries. "If, despite deficient warnings by the manufacturer, a user is fully aware of the danger which a warning would alert him or her of, then the lack of warning is not the proximate cause of the injury." *Strong*, 667 F.2d at 688 (negligent failure to warn).

In this case, Peitzmeier is an experienced mechanic who was familiar with the Hennessy tire changer and who had used it to change between 150 and 200 tires before the accident. Peitzmeier testified in his deposition

that he had read all of the Hennessy warning labels on the tire changer. Despite the presence of such warnings, Peitzmeier testified that it was his practice to exceed the service pressure rating on the tire by as much as ten psi in order to seat the beads. It is undisputed that the explosion occurred after Peitzmeier mismatched a sixteen-inch tire on a sixteen-and-one-half-inch wheel and then, disregarding Hennessy's clear warnings, greatly over-inflated the tire. In these circumstances, it is beyond cavil that an inadequate warning was not the proximate cause of Peitzmeier's injuries. The District Court thus properly granted summary judgment in favor of Hennessy on the Peitzmeiers' failure-to-warn claim.

IV.

The judgment of the District Court is affirmed.

At true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-2202NEO

Jeffrey L. Peitzmeier; Sherry L. Peitzmeier, Appellants, vs. Hennessy Industries, Inc., a New Jersey Corporation, d/b/a through its divisions Coats Company and Solar Industries, Inc., Appellee.	*	8:CV 93-477 Appeal from the United States District Court for the District of Nebraska

JUDGMENT

(Filed Oct. 29, 1996)

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

October 4, 1996

A true copy.

ATTEST: /s/ Michael E. Gins
CLERK, U.S. COURT OF
APPEALS, EIGHTH CIRCUIT

MANDATE ISSUED
OCT 25 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JEFFREY L. PEITZMEIER and SHERRY L. PEITZMEIER, Plaintiffs, vs. HENNESSY INDUSTRIES, INC., a New Jersey Corporation, d/b/a through its divisions COATS COMPANY and SOLAR INDUSTRIES, INC., Defendant.	8:93cv477 MEMORANDUM OPINION AND ORDER (Filed Apr. 14, 1995)

THIS MATTER IS before the Court on the defendant's motion for summary judgment, (filing no. 30). The Court finds that the motion should be granted.

This is a products liability action against the manufacturer of a tire changing machine. On June 4, 1992, the plaintiff, Jeffrey Peitzmeier, an employee at Top Tech Automotive Garage in Yutan, Nebraska, began to change a tire for a customer. He attempted to put a 16" tire on a 16½" wheel. While he was trying to change it, the tire exploded, severely injuring him.

A tire changing machine (1) removes the air from a tire/wheel assembly, (2) demounts the old tire from the wheel, (3) mounts the new tire on the wheel, and (4) inflates the new tire. The air is removed from the tire/wheel by a "bead loosener," which pushes the tire away from the wheel and allows the air to escape. The tire is then placed on the machine's table top or platform and clamps secure the wheel by its rim. The operator then inflates the new tire by "seating" the tire beads (wires in

the side wall of the tire) against the outer flanges of the wheel. The operator is not to exceed 40 psi (pressure per square inch) to seat beads. The beads must be seated before the tire can be inflated to its service pressure.

In this case, Peitzmeier was having difficulty in seating the beads. He tried beating on the tire with a rubber mallet and adding a little more air. The pressure gauge indicated that there was 60 psi of air in the tire. Peitzmeier's boss then informed him that the tire was a 16" instead of 16½". Peitzmeier went to let the air out of the tire and it exploded. He was struck in the face and head by the exploding tire/wheel assembly.

The plaintiffs allege that the tire changing machine was defective under section 402A of the Restatement (Second) of Torts.[1] They allege the machine was defectively designed

---

[1] Section 402A provides:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not brought the product from or entered into any contractual relation with the seller.

Restatement (Second) of Torts § 402A (1965).

because (1) it acted as a launch pad for the exploding tire/wheel assembly; (2) the clamps did not restrain the exploding tire/wheel assembly; (3) it had no device to limit the amount of pressure the operator could put into the tire; (4) it had no interlock system to prevent the operator from inflating the tire unless a restraint system was in place; and (5) the machine had no mirror or other means by which the operator could inspect the lower bead during inflation. The plaintiffs offer evidence that the tire changer could be designed in such a way to reduce injury in cases of exploding tires by eliminating or reducing the table top or platform of the machine. They also allege inadequate warnings and instructions regarding possible mismatches between tire and wheel sizes.

The defendant argues that the tire changer is not defective as a matter of law under section 402A because the machine is not unreasonably dangerous to the user.

Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party should prevail as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). A party opposing a properly supported motion for summary judgment may not rest upon the mere allegations or denials of his pleadings but must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e). However, the opposing party must be given the benefit of all favorable factual inferences and summary judgment cannot be granted when the non-movant shows that an allegedly undisputed fact actually presents a triable issue. *Holloway v. Lockhart*, 813 F.2d 874, 878 (8th Cir. 1987).

The plaintiffs assert that the tire changer could be made safer. Their expert, Dr. Alan L. Milner, a metallurgist, opines that simple design changes would eliminate the potential for injuries. Dr. Milner asserts that eliminating the table top or platform of the machine would significantly reduce injuries. He also asserts that a restraining device could have prevented the accident.

The defendant contends that Dr. Milner's testimony is inadmissible under *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993). The Court agrees.

Expert testimony is only admissible if it is relevant and reliable. *Id.* at 2796. It is only reliable if the reasoning or methodology underlying the testimony is scientifically valid. The Court looks at (1) whether the theory or technique has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) whether the theory has been generally accepted; and (4) the potential or known rate of error. *Id.* at 2796-97.

In this case, Dr. Milner's testimony is inadmissible. He is a metallurgist not a mechanical engineer. He has no experience in designing tire changing machines, has never worked for a company that makes the machines, and has never designed or built a machine that could be tested for safety or utility. He has never built any safety features such as a platform to reduce the "launch pad" effect of an exploding tire/wheel assembly, a restraint, or an interlock device. He recommends five safety features but is unable to demonstrate them except with sketches that have never been refined into engineering drawings. He admits that no manufacturer had offered a tire changing machine with these safety features to the consumer at

the time the one in question was manufactured. He also admits that there was no feasible, safer alternative design at that time. He has not submitted any of his concepts to peer review. He has testified numerous times in tire changing machine cases but has yet to follow through on developing his safety features. Until there is some type of prototype of his safer and non-defective tire changing machine which has been tested for utility and safety, there is insufficient reliable and relevant evidence for his testimony to be admissible. *See Sorenson v. Shaklee Corp.*, 31 F.3d 638, 648-51 (8th Cir. 1994).

In this case, the Court finds that the machine is not defective as a matter of law. It is safe for intended use. There is no evidence that the machine was defective or that the design caused the accident. There is no evidence that the machine caused the explosion or the accident. Peitzmeier caused the explosion by mismatching the tire and the wheel. The exploding tire/wheel assembly was the proximate cause of the accident not the tire changing machine. The purpose of the machine is not to prevent a tire from exploding. The tire changing machine is not unreasonably dangerous. If Peitzmeier had not mismatched the tire and the wheel, the accident would not have occurred. The machine acted as a passive surface against which the tire/wheel assembly reacted when it exploded. Any flat surface, including the floor, would have created the same result. Imposing liability on the defendant would serve no purpose because the accident was caused by operator error.

The plaintiffs also assert that the theory of crashworthiness or enhanced injury applies to this case. The Court disagrees. The manufacturer is only liable for the

portion of damages caused by the defective design. *Kudlacek v. Fiat, S.p.A.*, 244 Neb. 822, 830, 509 N.W.2d 603, 610 (1994). The plaintiff must prove that his injuries were enhanced as a result of the defective design or in cases of indivisible injury that the alleged defect was a substantial factor in causing the enhanced injuries. *Id.* at 830-31, 509 N.W.2d at 610-611.

In this case, the Court finds that the machine does not have a design defect. There is no evidence that if a different design had been used Peitzmeier's injuries would have been reduced.

The plaintiffs also argue failure to warn of the dangers of the machine. There is no duty to warn "if the user knows or should know of the potential danger, especially where the user is a professional who should be aware of the characteristics of the product." *Strong v. E.I. DuPont de Nemours Co.*, 667 F.2d 682, 687 (8th Cir. 1981). Peitzmeier had used the machine numerous times before the accident. He admitted that he had read the warning label on the machine advising the operator to keep his head and face away from the tire and never to exceed 40 psi while seating beads. He testified that he usually exceeded the service pressure rating on the tire to seat beads. Peitzmeier had inflated the tire to at least 60 psi before it exploded. He also stated that he always checks the tire and wheel sizes before changing a tire. "If, despite deficient warnings by the manufacturer, a user is fully aware of the danger which a warning would alert him or her of, then the lack of warning is not the proximate cause of the injury." *Id.* at 688. A warning would have had no effect in this case. Peitzmeier was aware of the danger and any

warning or lack thereof was not the cause of Peitzmeier's injuries.

The Court finds that the defendant's motion for summary judgment should be granted.

IT IS ORDERED:

1. the defendant's motion for summary judgment, (filing no. 30), is granted; and

2. this action is dismissed.

Dated this 14 day of April, 1995.

BY THE COURT:

/s/ William G. Cambridge
William G. Cambridge
Chief Judge

No. A 96-426

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

JEFFREY L. PEITZMEIER and
SHERRY L. PEITZMEIER,

Petitioners

vs.

HENNESSY INDUSTRIES, INC. d/b/a
COATS COMPANY AND SOLAR INDUSTRIES, INC.

Respondents

APPLICATION FOR EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

To the Honorable Clarence Thomas, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Eighth Circuit:

Petitioners, Jeffrey L. Peitzmeier and Sherry L. Peitzmeier, pray for a thirty day extension of time to file their Petition for Certiorari in this Court to and including February 1, 1997. The final judgment of the Eighth Circuit was entered on October 4, 1996, and Petitioners' time to petition for certiorari in this Court expires January 2, 1997. This application is being filed more than 10 days before that date.

A copy of the opinion below is attached to this Application. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

As shown by the opinion below, this case involves the application of Federal Rule of Evidence 702, as interpreted by this Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), to testimony of an expert witness based upon the training and experience of the witness, and not some particular or specialized scientific methodology. The opinion of the Eighth Circuit below on the applicability of the *Daubert* guidelines appears to be in conflict with the opinions of the Courts of Appeals of the Second, Third, Fifth, Ninth, and Tenth Circuits. (See Appendix).

Counsel of record for Petitioners, a law professor, completed the class instruction portion of the first semester of the 1996-1997 academic year on December 3, 1996. He was summoned to serve on jury duty in United States District Court for the District of Nebraska effective December 2, 1996, and is currently charged with the duty to be available for jury service throughout the month of December. Because of the uncertainty created by this civic obligation, and also because of other professional obligations, counsel of record believes good cause exists to grant Petitioners the extension of time requested in this Application.

WHEREFORE, Petitioners respectfully request that an order be entered extending their time to petition for certiorari to and including February 1, 1997.

Respectfully submitted by:

By /s/ Terry M. Anderson
Terry M. Anderson, #10102
Counsel of Record for Petitioners
Creighton Law School
Omaha, Nebraska 68178
(402) 280-3099
Mailing Address:
Hauptman, O'Brien, Wolf
& Lathrop, P.C.
9290 West Dodge Road,
Suite 403
Omaha, Nebraska 68114
(402) 390-9000

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing instrument was served by United States Mail, first class postage prepaid, on this 10th day of December, 1996, upon the following interested parties:

Larry C. Johnson
Johnson & Vaughn, P.C.
114 East Military Avenue
Fremont, Nebraska 68025
(402) 721-2430
Thomas C. Walsh
Bryan Cave LLP
One Metropolitan Square
211 North Broadway
St. Louis, Missouri
63102-2750
(314) 259-2000
Joseph G. Finnerty, Jr.,
Raymond G. Mullady, Jr.
William L. Reynolds &
H. Bruce Dorsey
of Piper & Marbury, LLP
Charles Center South
36 South Charles Street
Baltimore, Maryland
21201-3010
(410) 539-2530

Bruce R. Kaster
Green, Kaster & Falvey,
P.A.
125 N.E. First Avenue
Ocala, Florida 34470
(904) 732-9252

/s/ Terry M. Anderson

APPENDIX

Opinions of Circuit Courts of Appeal in apparent conflict with the opinion of the Eighth Circuit below:

McCullock v. H.B. Fuller Co., 61 F.3d 1038 (2nd Cir. 1995);
Holbrook v. Lykes Bros. S.S. Co., 80 F.3d 777 (3d Cir. 1996);
Carroll v. Morgan, 17 F.3d 787 (5th Cir. 1994);
Thomas v. Newton Exters., 42 F.3d 1266 (9th Cir. 1994);
Comptom v. Subaru of America, Inc., 82 F.3d 1513 (10th Cir. 1996).

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

December 17, 1996

Mr. Terry Anderson
9290 West Dodge Road
Suite 403
Omaha, NE 68114

Re: Jeffrey L. Peitzmeier, et ux. v. Hennessy Industries, Inc.
Application No. A-426

Dear Mr. Anderson:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Thomas, who on December 17, 1996, extended the time to and including February 1, 1997.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

Sandra Elliott Spagnolo
Assistant Clerk

Supreme Court, U.S.
FILED
MAR 31 1997
CLERK

No. 96-1212

In The

Supreme Court of the United States

October Term, 1996

JEFFREY L. PEITZMEIER and SHERRY L. PEITZMEIER,

Petitioners,

vs.

HENNESSY INDUSTRIES, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JOSEPH G. FINNERTY, JR.
Counsel of Record
RAYMOND G. MULLADY, JR.
WILLIAM L. REYNOLDS
H. BRUCE DORSEY
PIPER & MARBURY L.L.P.
Attorneys for Respondent
36 South Charles Street
Baltimore, Maryland 21201
(410) 539-2530

70858 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, Inc.

QUESTIONS PRESENTED

1. Is denial of the Petition warranted because there has been insufficient opportunity for the lower courts and commentators to consider the scope of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and to resolve intracircuit conflicts?

2. In light of the fact that the district court's grant of summary judgment in Hennessy's favor was based on independent grounds, is this case an appropriate vehicle for resolution of the perceived conflict over *Daubert's* meaning?

3. Did the lower courts properly apply *Daubert* to exclude the unreliable expert testimony proffered by petitioners?

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, respondent Hennessy Industries, Inc. states that it is wholly owned by DH Holdings Corporation, which in turn is wholly owned by Danaher Corporation, and that Danaher Corporation has no parent company. Hennessy Industries, Inc. has no non-wholly owned subsidiaries.

TABLE OF CONTENTS

	Page
Questions Presented	i
Rule 29.6 Statement	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	1
Statement of the Case	1
A. Proceedings Below	1
B. Correction of Misstatements in the Petition	3
Reasons for Denying the Writ	6
I. It Would Be Premature To Revisit *Daubert* Because The Lower Courts Have Not Had Sufficient Opportunity To Consider Its Scope.	8
II. Summary Judgment Was Properly Granted For Reasons Independent Of The Inadmissibility Of Expert Testimony.	12
III. Milner's Testimony Was Properly Excluded Under *Daubert*.	15
Conclusion	17

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Bogosian v. Mercedes-Benz of North America, Inc., 104 F.3d 472 (1st Cir. 1996) 11

Compton v. Subaru of America, Inc., 82 F.3d 1513 (10th Cir. 1996) 9, 10, 11

Cummins v. Lyle Indus., 93 F.3d 362 (7th Cir. 1996) . 11

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) ..... *passim*

Duffee v. Murray Ohio Mfg. Co., 91 F.3d 1410 (10th Cir. 1996) 10, 11

Guillory v. Domtar Indus., 95 F.3d 1320 (5th Cir. 1996) 11

Hancock v. Paccar, Inc., 283 N.W. 2d 25 (Neb. 1979) 15

Iacobelli Construction v. County of Monroe, 32 F.3d 19 (2d Cir. 1994) 8, 9

McCullock v. H.B. Fuller Co., 61 F.3d 1038 (2d Cir. 1995) 9

Smelser v. Norfolk Southern Ry. Co., 105 F.3d 299 (6th Cir. 1997) 11

Contents

	Page
Southland Sod Farms v. Stover Seed Co., 1997 U.S. App. LEXIS 4275 (9th Cir. Mar. 11, 1997)	10
The Monrosa v. Carbon Black Export, Inc., 359 U.S. 180 (1959)	14
Thomas v. Newton Int'l Enter., 42 F.3d 1266 (9th Cir.1994)	10
Tyus v. Urban Search Management, 102 F.3d 256 (7th Cir. 1996)	7, 16
Rules Cited:	
Federal Rule of Evidence 702	2, 3
Supreme Court Rule 15.1	3
Other Authorities Cited:	
John M. Harlan, *Manning the Dikes*, 13 Record of N.Y.C. Bar Assn. 541 (1958)	11
Robert L. Stern, *et al., Supreme Court Practice* § 4.6 (7th ed. 1993)	11, 14
John P. Stevens, *Some Thoughts on Judicial Restraint*, 66 Judicature 177 (1982)	12
Restatement (Second) of Torts, § 402A	2

Respondent Hennessy Industries, Inc. ("Hennessy") respectfully opposes the petition for writ of certiorari.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, filed October 4, 1996 (Pet. App. 1a-14a), is reported at 97 F.3d 293. The opinion and order of the United States District Court for the District of Nebraska, filed April 14, 1995 (Pet. App. 16a-22a), is unreported.

STATEMENT OF THE CASE

This is a products liability case arising out of an accident which occurred when petitioner Jeffrey Peitzmeier ("Peitzmeier") was struck in the face and head by a tire which exploded while he was changing it on a tire changing machine ("tire changer") manufactured by Hennessy. The tire changer did not cause the tire to explode; rather, the explosion was caused by Peitzmeier's over-inflation of a tire which he was trying to mount on a wheel rim that was too large for the tire. Peitzmeier was not struck by any part of the tire changer.

A. Proceedings Below

Petitioners sued Hennessy in the United States District Court for the District of Nebraska. They alleged that the tire changer was defective in design and that the defect enhanced Peitzmeier's injuries.

In a failed attempt to prove these claims, petitioners ventured to Tucson, Arizona for the "expert" advice of Alan L. Milner ("Milner"), a metallurgist with no expertise in mechanical engineering, machine design, or biomechanics. Milner opined that the tire changer's design was improper in two respects: (1)

Two of its features were defective; and (2) it lacked devices which would have prevented the accident. The two allegedly defective features were (i) the machine's platform, which allegedly acted as a "launch pad" for the exploding tire; and (ii) the machine's clamps, which failed to "restrain" the exploding tire. The "safety devices" which Milner found lacking — none of which he had ever designed, built, tested, or even illustrated — were (i) a device to limit the amount of air pressure that the operator could put in the tire; (ii) a "restraint" system; (iii) an "interlock" system to prevent the operator from inflating the tire unless a "restraint system" was in place; and (iv) a mirror or other means by which the operator could "inspect" the underside of the tire during inflation. (C.A. App. 347-48). Milner also opined that the tire changer was equipped with inadequate warnings and instructions. (C.A. App. 347).

Hennessy moved for summary judgment on a number of independent grounds. First, Hennessy contended that petitioners' contention that the tire changer was defective was at odds with the language and policy of § 402A of the Restatement (Second) of Torts, which has been adopted in Nebraska and establishes a cause of action in strict products liability. Second, Hennessy argued that even if such an action were available to petitioners, they had failed to establish its necessary predicates because they had no admissible proof of either (i) a defective and unreasonably dangerous product; or (ii) a causal link between a tire changer defect and Peitzmeier's injuries; or (iii) that any warning would have avoided the accident. Finally, Hennessy argued that Milner's opinions could not overcome the deficiencies in petitioners' case because his testimony was inadmissible under Federal Rule of Evidence 702 and this Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

The district court granted the motion for summary judgment

and dismissed the complaint. (Pet. App. 20a-22a). The court held that Milner's testimony was not admissible, that the tire changer was not defective as a matter of law, and that the proximate cause of the accident was operator error. (Pet. App. 20a).

The court of appeals found that the district court had not abused its discretion in excluding Milner's testimony and affirmed the district court's grant of summary judgment. (Pet. App. 8a-9a). That court, however, did not reach the other grounds advanced by Hennessy in support of the grant of summary judgment.

B. Correction of Misstatements in the Petition

The opinion of the court of appeals correctly sets forth the facts of the case. Pursuant to United States Supreme Court Rule 15.1, Hennessy brings the following misstatements of fact contained in the Petition to the Court's attention.

Petitioners assert that Hennessy contended in its motion for summary judgment that Milner's testimony was inadmissible for the sole reason that it was unreliable under *Daubert*. That is not true. In addition to demonstrating the unreliability of Milner's testimony, Hennessy set forth at length Milner's lack of qualifications in mechanical engineering, machine design, and biomechanics under Rule 702. The district court enumerated Milner's lack of qualifications in those areas as part of its decision to exclude his testimony. (Pet. App. at 19a).

Petitioners also misinform the Court of the reasoning underlying the district court's grant of summary judgment. Contrary to petitioners' argument that the district court relied solely on the inadmissibility of Milner's opinions under *Daubert*, at least ***seven other grounds*** supported the court's ruling independent of the exclusion of Milner's testimony: (1) the tire

changer did not cause "the explosion or the accident"; (2) the tire changer was "not defective as a matter of law" because it was "safe for its intended use"; (3) the tire changer was "not unreasonably dangerous" because its purpose was "not to prevent a tire from exploding" and because it merely "acted as a passive surface against which the tire/wheel reacted when it exploded"; (4) the crashworthiness or enhanced injury theory of liability did not apply to the case; (5) there was inadequate evidence of injury enhancement, since there was "no evidence that if a different design had been used Peitzmeier's injuries would have been reduced"; (6) Hennessy had "no duty to warn"; and (7) any lack of warning was not the cause of Peitzmeier's injuries. (Pet. App. 20a-21a). *Each* of these rulings of the district court, somehow overlooked by petitioners, provide independent bases for summary judgment unrelated to the *Daubert* ruling.

Petitioners also misrepresent the scope of Milner's opinions and testimony. They argue that, in a "rush to apply the *Daubert* reliability factors," both courts below looked "exclusively at those parts of [Milner's] testimony relating to alternative designs and their feasibility." Petition at 9.

That incorrect statement is central to petitioners' argument, for they contend that, under Nebraska law, Milner's testimony on alternative designs was not necessary to establish the existence of a design defect. Petition at 8-9. Thus, they claim that Milner's testimony about the lack of specific devices was not offered as part of his design defect opinion, but rather, "was elicited by petitioners as a response to Respondents' expected 'state of the art' defense under Nebraska law." Petition at 9, n. 4. Thus, the argument runs, the exclusion of Milner's testimony would not have justified summary judgment.

Unfortunately, that revisionist history contradicts Milner's unambiguous testimony. At deposition, Milner testified that the

absence of his proposed safety devices was the ***reason why the tire changer was defective***:

> (Mr. Mullady):
>
> Q. Sir, is it your opinion in this case that the Coats model RC20AA tire-changing machine being used by Mr. Peitzmeier on the date of the accident was a defective product?
>
> A. Yes, sir.
>
> Q. Why was it defective?
>
> A. Well, it was defective for a number of design reasons. It was defective because it has a method of supporting the tire/wheel assembly in its operating position, which represents an efficient launching platform situation. It *has no means of restraining the tire/wheel assembly in place* on the platform or tabletop. And it *has no inflation interlock system.* And it *has no pressure limitation and direct pressure reading inflation system* attached to it. I think those are the primary design considerations that come to mind.

(C.A. App. 346-47) (emphasis added). In short, Milner testified that the changer was defective because it lacked the components of his alternative design. It is not surprising that petitioners have attempted to rewrite their witness's testimony.

REASONS FOR DENYING THE WRIT

This is not a difficult case. In *Daubert*, this Court held that the trial judge should act as a "gatekeeper" to ensure that expert scientific testimony is admitted only if is relevant and reliable. The district court in this case properly exercised its gatekeeping function. It examined Milner's qualifications and the methodology underlying his opinions and found that the proffered testimony lacked reliability. For that and other reasons, the district court granted summary judgment against petitioners. In short, this case presents merely a routine application of *Daubert* to the unreliable opinions of an unqualified expert in a products liability case.

Nevertheless, petitioners have sought review in this Court. They have attempted to dress up this run-of-the-mill gatekeeping case as presenting a conflict among the circuits. That it does not.

Petitioners assert that the courts of appeal are "inextricably entrenched" in disagreement over the meaning of *Daubert*. Petition at 7. In articulating this conflict, petitioners rely principally on two decisions issued by panels in the Second and Tenth Circuits in support of the proposition that the *Daubert* reliability requirement does not apply to expert engineering testimony, on the grounds that such testimony is not "scientific" or that it is not based on any particular methodology. That claimed interpretation, they contend, runs afoul of decisions issued by the First, Fifth, Sixth, Seventh, and Eighth Circuits, which have applied the *Daubert* reliability requirement more broadly.

In making this argument, however, petitioners have ignored subsequent decisions issued by other panels in the Second and Tenth Circuits which do not support their characterization of a

conflict between the circuit courts. At most, *intra*circuit conflicts exist in the Second and Tenth Circuits which require resolution by those courts rather than by this Court.

Moreover, any conflict among panels on the same circuit shows that this issue has not sufficiently "percolated" to warrant this Court's revisiting *Daubert*. Although the lower courts have strongly supported the ruling of the Eighth Circuit in this case, the confusion, if any, in the Second and Tenth Circuits merely suggests that more time is needed for the lower courts and commentators to digest *Daubert* before it returns to this Court for clarification.

In any event, this case provides a poor vehicle for a further interpretation of *Daubert*. Petitioners portray this case as hinging on the appropriateness of the district court's exclusion of Milner's testimony as unreliable under *Daubert*. That portrayal, however, ignores the several independent grounds relied upon by the district court in granting summary judgment to Hennessy. The presence of those independent factors means that this Court's review on the basis of *Daubert* would be an empty gesture. Petitioners have not sought review of those grounds in this Court, and none of them presents issues of federal law warranting this Court's review.

Finally, Milner's testimony was properly excluded under *Daubert*. Quite simply, Milner lacked the training and experience to opine as an expert in tire changers and failed to adhere to "the same standards of intellectual rigor that are demanded in his or her professional work." *Tyus v. Urban Search Management*, 102 F.3d 256, 262 (7th Cir. 1996).

I.

IT WOULD BE PREMATURE TO REVISIT *DAUBERT* BECAUSE THE LOWER COURTS HAVE NOT HAD SUFFICIENT OPPORTUNITY TO CONSIDER ITS SCOPE.

Petitioners implicitly assert that neither the Second nor Tenth Circuits would have excluded Milner's testimony under *Daubert*. They base their argument primarily on one case from each Circuit.

• **The Second Circuit.** Petitioners assert that the Second Circuit in *Iacobelli Construction v. County of Monroe*, 32 F.3d 19 (2d Cir. 1994), "refused to apply the *Daubert* factors to proffered testimony of geotechnical consultants in a construction contract case." Petitioners overstate the Second Circuit's discussion of *Daubert*. In *Iacobelli*, the district court in granting summary judgment had rejected the affidavits of a geotechnical consultant and an underground construction consultant as conclusory and for failing to articulate how the conclusions were reached, apparently relying on *Daubert*. Reversing the grant of summary judgment, the Second Circuit found the district court's "reliance on *Daubert* misplaced" and in elaboration stated that the affidavits

> do not present the kind of "junk science" problem that *Daubert* meant to address. *See Tamarin v. Adam Caterers, Inc.*, 13 F.3d 51, 53 (2d Cir. 1993) (Daubert "specifically dealt with the admissibility of scientific evidence"). Rather, they rely upon the type of methodology and data typically used and accepted in construction litigation cases.

Id. at 25. That review of the methodology (especially the finding that it was "typical[ ]"), along with the conclusion that "junk science" was not involved, does not present the clear conflict with the other circuits that petitioners describe. The Second Circuit merely found on the facts before it that the district court had not properly performed its "gatekeeping" function.

Moreover, petitioners ignore what the Second Circuit actually did a year later in *McCullock v. H.B. Fuller Co.*, 61 F.3d 1038 (2d Cir. 1995). In *McCullock*, the defendant argued that the testimony of a "consulting engineer" should have been excluded under *Daubert* because it lacked grounding in science. Affirming the decision to admit the testimony, the Second Circuit found that the testimony "easily qualifie[d] for admission under *Daubert*." *Id.* at 1043. The court reviewed numerous aspects of the methodology used by the expert to reach his opinion in finding his testimony properly admitted. *Id.* Contrary to the premise underlying the Petition here, the Second Circuit applied *Daubert* to "non-scientific" expert testimony (specifically identified as "specialized knowledge") in *McCullock*. Thus, the support that petitioners seek from the Second Circuit to create a conflict over the application of *Daubert* to non-scientific expert testimony is illusory.

• **The Tenth Circuit.** Petitioners also rely on the Tenth Circuit's decision in *Compton v. Subaru of America, Inc.*, 82 F.3d 1513 (10th Cir. 1996). *Compton* involved the testimony of a mechanical engineer who opined that the roof support structures in a car were defective because they permitted excessive roof crush in a rollover. The Tenth Circuit held that *Daubert* did not apply because the witness had not relied upon any particular methodology, but reached his opinions by relying upon general engineering principles and concepts. *Id.* at 1519-20.

Three months later, the Tenth Circuit issued its decision in

Duffee v. Murray Ohio Mfg. Co., 91 F.3d 1410 (10th Cir. 1996), a products liability case involving an alleged defective bicycle brake. In affirming the grant of summary judgment because the testimony of an engineer was unreliable under *Daubert*, the Tenth Circuit explicitly adopted the reasoning of the district court. *Id.* at 1410. In its opinion, reported at 879 F. Supp. 1078, that court found that the expert's "conclusory opinion lack[ed] a reliable factual basis, an acceptable methodology, and the necessary validation." *Id.* at 1084. The expert, who relied upon his own experience with bicycles, a conversation with a bicycle retail dealer, and his own rudimentary testing conducted on a hill, failed to employ the methodology or analysis that would have been employed by a reasonable bicycle manufacturer in reaching his conclusion. *Id.* at 1086. Thus, in *Duffee*, the Tenth Circuit expressly approved the application of *Daubert* to the testimony of an engineer who relied on his own experience.

Milner's testimony certainly would have been excluded under *Duffee:* Milner had done no testing and had no experience as a designer of tire changers. He, like the *Duffee* expert, was but a dilettante in a specialized field.

The direct conflict between the circuits portrayed by petitioners[1] collapses like a house of cards upon close inspection. *McCollock* establishes that there is no support for petitioner's contention that the Second Circuit "refuses" to apply the *Daubert* reliability requirement to expert engineering testimony. Although the Tenth Circuit's decision in *Compton* is an aberration

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1. Petitioners also cite the Ninth Circuit's decision in *Thomas v. Newton Int'l Enter.*, 42 F.3d 1266 (9th Cir. 1994), where the court stated that "*Daubert* was clearly confined to the evaluation of scientific testimony." *Id.* at 1270 n. 3. The Ninth Circuit has since stated in *Southland Sod Farms v. Stover Seed Co.*, 1997 U.S. App. LEXIS 4275 (9th Cir. Mar. 11, 1997), that "*Daubert's* holding applies to all expert testimony, not just testimony based on novel scientific methods." *Id.* at *23 n. 8.

compared to the overwhelming majority of other circuits which apply *Daubert* to expert engineering testimony[2], *Duffee* calls into question the continued validity of *Compton*. The result, therefore, is an intracircuit conflict which needs resolution by the Tenth Circuit.

Rather than a conflict between the circuits, therefore, petitioners at most have identified intracircuit conflicts within the Second and Tenth Circuits. Hennessy submits that intracircuit conflicts of this nature are not a proper basis for the exercise of this Court's certiorari power. As Justice Harlan once stated, "decisions between different panels of the same Court of Appeals will not be considered to present a reviewable conflict, since such differences of view are deemed an intramural matter to be resolved by the Court of Appeals itself." John M. Harlan, *Manning the Dikes*, 13 Record of N.Y.C. Bar Assn., 541, 552 (1958) (*quoted in* Robert L. Stern, *et al.*, *Supreme Court Practice* § 4.6, at 176 (7th ed. 1993)).

Hennessy also submits that review of *Daubert* would be premature at this time. Too little time has passed since that ruling to expose fully the nuances of its meaning to the crucible of experience in the lower courts and to the critical analysis of commentators. As Justice Stevens has observed:

> It would be better of course if federal law could be applied uniformly in all federal courts, but experience with conflicting interpretation of federal rules may help illuminate an issue before it is finally resolved and thus may play a constructive role in the

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2. *See Bogosian v. Mercedes-Benz of North America, Inc.*, 104 F.3d 472 (1st Cir. 1996); *Guillory v. Domtar Indus.*, 95 F.3d 1320 (5th Cir. 1996); *Smelser v. Norfolk Southern Ry. Co.*, 105 F.3d 299 (6th Cir. 1997); *Cummins v. Lyle Indus.*, 93 F.3d 362 (7th Cir. 1996).

> lawmaking process. The doctrine of judicial restraint teaches us that patience in the judicial resolution of conflicts may produce the most desirable result.

John P. Stevens, *Some Thoughts on Judicial Restraint*, 66 Judicature 177, 183 (1982). This Court, therefore, should deny the Petition.

II.

SUMMARY JUDGMENT WAS PROPERLY GRANTED FOR REASONS INDEPENDENT OF THE INADMISSIBILITY OF EXPERT TESTIMONY.

Numerous grounds independent of the inadmissibility of expert testimony supported the district court's grant of summary judgment in Hennessy's favor. Many of these grounds related to state law issues of products liability law and policy.

For example, because it was uncontroverted that the tire changer did not (i) cause Peitzmeier to "mismatch" incompatible tire and rim components; (ii) cause the tire to explode; or (iii) cause different or more serious injuries to Peitzmeier other than those he would have sustained in the same accident without a tire changer, Hennessy argued that petitioners' claim did not fit within either the language or policy of Nebraska's definition of a "defective and unreasonably dangerous" product. The district court agreed:

> In this case, the Court finds that the machine is not defective as a matter of law. It is safe for intended use. There is no evidence that the machine was defective or that the design caused the accident. *There is no evidence that*

> *the machine caused the explosion or the accident.* Peitzmeier caused the explosion by mismatching the tire and the wheel. The exploding tire/wheel assembly was the proximate cause of the accident not the tire changing machine. *The purpose of the machine is not to prevent a tire from exploding. The tire changing machine is not unreasonably dangerous.* If Peitzmeier had not mismatched the tire and the wheel, the accident would not have occurred. *The machine acted as a passive surface against which the tire/wheel assembly reacted when it exploded. Any flat surface, including the floor, would have created the same result. Imposing liability on the defendant would serve no purpose because the accident was caused by operator error.*

(Pet. App. 20a) (emphasis added). The district court also agreed with Hennessy that Nebraska law would not extend the crashworthiness doctrine to petitioners' claims:

> The plaintiffs also assert that the theory of crashworthiness or enhanced injury applies to this case. The Court disagrees. The manufacturer is only liable for the portion of damages caused by the defective design. *Kudlacek v. Fiat, S.p.A.*, 244 Neb. 822, 830, 509 N.W.2d 603, 610 (1994). The plaintiff must prove that his injuries were enhanced as a result of the defective design or in cases of indivisible injury that the alleged defect was a substantial factor in causing the

> enhanced injuries. *Id.* at 830-31, 509 N.W.2d at 610-11.
>
> In this case, the Court finds that the machine does not have a design defect. There is no evidence that if a different design had been used Peitzmeier's injuries would have been reduced.

(Pet. App. 20a-21a). With the crashworthiness doctrine unavailable, Petitioners could not establish causation under Nebraska products liability law. In other words, because Peitzmeier was injured through contact with an exploding tire, which the tire changer did not cause to explode, petitioners had no cause of action under Nebraska law regardless of the admissibility of Milner's testimony.

Although the issue of the applicability of *Daubert*'s reliability requirement to expert engineering testimony and other purportedly non-scientific testimony is important, it is not central to the outcome below. As Justice Brennan once said:

> While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeal is judicial, not simply administrative or managerial. Resolution here of the [conflict between the circuits] can await a day when the issue is posed less abstractly.

The Monrosa v. Carbon Black Export, Inc., 359 U.S. 180, 184 (1959). *See also* Stern, § 4.4, at 172.

The independent reasons for granting summary judgment

in favor of Hennessy demonstrate that this is not the "meaningful litigation" in which to provide any further clarification of *Daubert*.

III.

MILNER'S TESTIMONY WAS PROPERLY EXCLUDED UNDER *DAUBERT*.

Finally, review by this Court is not appropriate because the lower courts' application of the *Daubert* factors to exclude Milner's testimony was entirely correct.

Milner's testimony that the tire changer was defective was based on two interrelated concepts. First, he believed that the tire changer's platform and clamping system presented a risk of operator injury because an exploding tire could propel off the "launch pad" and would not be restrained by the clamps. Second, he opined that the way to reduce this risk of injury was to incorporate safety devices that he had conceptualized, but had not designed, built, tested, or shown to other engineers.

Even assuming petitioners are correct that Milner's "training and experience" alone informed his analysis of the "risk created by" the tire changer's platform and clamping system, the district court would have erred had it admitted his testimony on that basis. Under Nebraska law, a manufacturer does not have a duty to design a "risk-free" product, only one that is *reasonably* safe. *Hancock v. Paccar, Inc.*, 283 N.W. 2d 25, 40 (Neb. 1979). Milner's testimony about the performance and benefits of his conceptual safety devices was central to the issue of whether the product was "unreasonably" dangerous, and it appropriately became the focus of the district court's "gatekeeping" analysis.

Petitioners' analogy to the hypothetical expert who believes

cellular phones cause brain cancer, *see* Petition at 23, says much about their decision to seek review in this case. In that hypothetical, petitioners agree that application of the *Daubert* factors would be appropriate; otherwise, the trial judge would not know whether the expert's opinion was supported by accepted scientific methodology or by the expert's "subjective, unsupported belief." Petition at 23. Implicit in petitioners' hypothetical is the acknowledgment that *Daubert's* "reliability" factors *must be applied when the expert's opinion cannot be informed by training and experience,* regardless whether the subject matter of the expert's testimony is "technical," "specialized" or "scientific" knowledge.[3]

Milner's training and experience, however, did not permit him to speculate about proposed tire changer designs, and his design concepts were subjected to none of the intellectual rigors of the mechanical engineering profession. The district court, therefore, applied the *Daubert* factors as the only available means to assess the validity of Milner's design defect opinions, and did so properly.

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3. Petitioners contend that "engineering" is not "science" for *Daubert* purposes. There is no basis for such an artificial distinction. The mechanical engineering of products and medical research of the type at issue in *Daubert* both depend heavily upon repeated testing and review as part of the process of validation in the real world. Requiring an expert witness to adhere to "the same standards of intellectual rigor that are demanded in his or her professional work [outside the courtroom]," *Tyus,* 102 F.3d at 262, is what *Daubert* is all about. It is here where Milner, and the medical researchers in *Daubert* itself, failed.

CONCLUSION

For the reasons set forth above, Hennessy respectfully requests that the petition be denied.

Respectfully submitted,

JOSEPH G. FINNERTY, JR.
Counsel of Record
RAYMOND G. MULLADY, JR.
WILLIAM L. REYNOLDS
H. BRUCE DORSEY
PIPER & MARBURY L.L.P.
Attorneys for Respondent
36 South Charles Street
Baltimore, Maryland 21201
(410) 539-2530